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In the Supreme Court of the United States

MARVIN D. HORNE, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Founded in 1912, the Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country. More than 96 percent of the Chamber's members are small businesses with 100 or fewer employees. The Chamber represents the interests of its members in matters before Congress, the Executive Branch, and the courts.

The Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the Nation's business community, including cases defending constitutional protections for private property rights against government infringement. The Chamber filed a brief *amicus curiae* at the certiorari stage in this case, a brief *amicus curiae* supporting the same property owners when this case was last before this Court as *Horne* v. *Department of Agriculture*, No. 12-123 (leading to a unanimous reversal of the Ninth Circuit's prior judgment), and in *Koontz* v. *St. Johns River Water Management District*, No. 11-1447 (which resulted in a property-rights-protective ruling that supports petitioners in this case).

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[1] No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, and its counsel made any monetary contribution to its preparation and submission. The parties have consented to this filing.

On remand from this Court's prior reversal, the Ninth Circuit again sharply departed from this Court's longstanding takings jurisprudence, adopting a dangerous new test that guts property rights protections. The decision is of grave practical concern to the Chamber and its members, which have a substantial interest in ensuring that property owners retain an adequate, efficient, and prompt remedy against government takings of real and personal property. Historically, the property rights of Chamber members have been subject to infringement by state and federal governments in a wide range of circumstances, including through laws, like those at issue here, which impose monetary fines or penalties as a proxy for outright physical appropriation of private property.

The Ninth Circuit held here that a federal law requiring petitioners to transfer physically to the government a substantial portion of their annual raisin crop—or face a fine, including an amount equal to the value of the raisins that the government demanded be handed over—was not a categorical "taking." Thus, property owners are protected under the Fifth Amendment, if at all, only by the "nexus and rough proportionality" standard formerly limited to land-use exactions, or the general ad hoc regulatory takings doctrine. Adding insult to injury, the court below sought to defend its rule by suggesting that petitioners could avoid the expropriation simply by abandoning their four-generation family vocation and instead "choosing" to produce something other than raisins. The Ninth Circuit's radical decision (and the government's shifting array of novel and flawed theories proffered to defend it) creates

significant doctrinal confusion and substantially weakens Fifth and Fourteenth Amendment rights, with wide-ranging consequences for business interests and private property holders nationwide. The Court should reverse.

SUMMARY OF ARGUMENT

The decision below improperly conflates the categorical framework long applicable to permanent physical occupations of property with the more fact-intensive analysis used for regulatory takings—including a balancing test that this Court has traditionally reserved for land-use exactions. In particular, the Ninth Circuit's holding that *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), "applies *only* to a total, permanent physical invasion of *real* property" (Pet. App. 17a (emphases added))—and thus is inapplicable when the government appropriates personal property—represents a dangerous retreat from a bright-line rule that has long served as an important bulwark for property rights, as reflected in this Court's and lower-court authority.

The decision threatens private property rights in a broad range of contexts, and creates dangerous incentives for the government to disguise traditional takings in an effort to reframe the governing legal analysis and exploit the loophole created by the panel's novel doctrinal approach. Personal property is no less at risk of government interference—and thus no less deserving of the certainty and predictability provided by a per se rule for physical takings—than real property. Case reporters are replete with examples of the government appropriating personal

property, illustrating the diverse forms of interference with, and abuse of, property rights that the decision effectively green-lights.

The decision below also errs by holding just compensation is not required where a property owner retains some theoretical right to proceeds from the property or benefit from a regulatory scheme, and that a permanent physical occupation can be reframed as a mere "use restriction." The outright physical appropriation that occurs under this regulatory regime cannot be immunized from constitutional scrutiny simply by analogizing it to a different (and hypothetical) law that regulates how and when a private owner may dispose of its own raisins in commerce.

The panel's "use restriction" theory, in particular, amounts to the unprecedented and indefensible notion that the government can condition a property owner's ability to sell goods on its "agreement" to hand over a significant fraction of its property to the government, for the government to dispose of as it sees fit. That dangerous idea is anathema to bedrock principles of property rights, admits to no principled limitation, and is irreconcilable with numerous decisions of this Court and lower state and federal courts.

This Court should reverse the judgment below, and reaffirm *Loretto*'s core teaching that a taking occurs whenever the government physically occupies or appropriates private property. That result is necessary to avert dire effects on private property rights nationwide and to avoid inviting governments to reframe a broad range of unconstitutional appropriations as mere "use restrictions."

ARGUMENT

I. Diluting The Per Se Physical Takings Doctrine Will Have Serious Negative Effects On Property Rights Nationwide

As petitioners explain, the panel erred, and ignored the weight of well-reasoned decisions from other courts, by holding that: (1) the government's appropriation of a portion of petitioners' raisin crop does not constitute a per se physical taking of private property under *Loretto*; (2) there was no per se taking because petitioners purportedly retained a contingent, theoretical interest in the raisins or enjoyed indirect benefits from the regulatory program as a whole; and (3) whether the regulation effects a categorical taking is governed by the "nexus and rough proportionality" balancing test for land-use exactions under *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994). *Amicus* complements that analysis by illustrating how the panel's holding will have wide-ranging negative practical effects on private property rights, and by highlighting the ways in which the decision creates doctrinal confusion and harms important interests that are far better served by the long-standing categorical rule.[2]

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[2] Contrary to its prior representations to this Court and others, the government's brief in opposition for the first time argues that the raisin marketing order does not formally transfer "title" from raisin producers to the Raisin Administrative Committee. See Br. in Opp. 6, 17, 23. As petitioners explain, the argument is unavailing, because physical appropriation of property implicates the Takings Clause. *E.g.*, *United States* v. *General Motors Corp.*, 323 U.S. 373, 378 (1945) ("Governmental action short of acquisition of

A. The Per Se Physical Takings Rule Is An Important Bulwark For Private Property Rights

The panel's basic doctrinal innovation—*i.e.*, analyzing a physical appropriation of petitioners' raisins under the ad hoc, fact-intensive regulatory takings standard rather than *Loretto*'s per se rule—undermines important interests of predictability and clarity reflected in this Court's development of categorical rules for particular classes of takings.

1. Regulatory takings have long been governed by the "essentially *ad hoc*, factual inquir[y]" set forth in *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978); see also *E. Enters.* v. *Apfel*, 524 U.S. 498, 523 (1998) (plurality opinion). By design and practical effect, that approach requires

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title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking."); Pet. Br. 23-25.

Here, the marketing order requires producers to give up physical possession of "reserve" raisins, requires handlers to store reserve raisins "for the account" of the Raisin Administrative Committee, requires raisins to be delivered to the committee at its sole direction, 7 C.F.R. §§ 989.66(a), (b)(2), (b)(4), and vests the Committee with typical rights and obligations of ownership, see *id.* §§ 989.66(f), (g), 989.67(b)-(e) (Committee pays costs of storage, may "in its discretion" use raisins as "security" for loans, and can sell or "gift" raisins as it sees fit); accord Pet. Br. 23-25. Retention of a vague "equitable" claim to such proceeds (if any) remaining after the government has disposed of reserve raisins in this fashion, 7 U.S.C. § 608c(6)(E), is a far cry from rights long protected by the Takings Clause. See *Loretto*, 458 U.S. at 435 ("Property rights in a physical thing have been described as the rights to possess, use and dispose of it." (quotation marks omitted)).

courts to undertake "complex factual assessments of the purposes and economic effects of government actions," *Yee* v. *City of Escondido*, 503 U.S. 519, 523 (1992), and to grapple with that "well-known, if less than self-defining" question, *Palazzolo* v. *Rhode Island*, 533 U.S. 606, 617 (2001), of whether a particular regulation "goes too far," *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922). That approach stems from the pragmatic concern that subjecting "regulations prohibiting private uses [of property]" to a categorical takings rule "would transform government regulation into a luxury few governments could afford," given the "ubiquit[y]" of such regulations in the modern era. *Tahoe-Sierra Pres. Council, Inc.* v. *Tahoe Reg'l Planning Agency*, 535 U.S. 302, 323-324 (2002). But the regulatory takings test has, in practice, become a famously "difficult problem"; "The attempt to determine when regulation goes so far that it becomes, literally or figuratively, a 'taking' has been called the 'lawyer's equivalent of the physicist's hunt for the quark.'" *Williamson Cnty. Reg'l Planning Comm'n* v. *Hamilton Bank of Johnson City*, 473 U.S. 172, 199-200 & n.17 (1985) (quoting C. Haar, *Land-Use Planning* 766 (3d ed. 1976)).

This complex and fact-intensive approach for regulatory takings analysis imposes significant costs on property owners and litigants, burdening the exercise of private property rights. "[A] party challenging governmental action as an unconstitutional taking bears a substantial burden," *E. Enters.*, 524 U.S. at 523, in navigating the complex, ad hoc, regulatory-takings framework. In addition to requiring property owners to adduce proof on a wide range of issues (such as a regulation's "economic effect on the land-

owner," interference with "reasonable investment-backed expectations," and "the character of the government action," *Palazzolo*, 533 U.S. at 617), the regulatory takings doctrine necessarily deprives property owners of predictability and certainty. "Cases attempting to decide when a regulation becomes a taking are among the most litigated and perplexing in current law." *E. Enters.*, 524 U.S. at 541 (Kennedy, J., concurring in the judgment and dissenting in part); see also *Store Safe Redlands Assocs.* v. *United States*, 35 Fed. Cl. 726, 729 (1996) ("Since 1922, the Supreme Court has applied a test in regulatory taking cases that is seen by many as so fact specific that general predictability is made very difficult."). Governments, too, suffer costs and uncertainty from unpredictable legal rules. See *E. Enters.*, 524 U.S. at 542 (Kennedy, J.) ("boundar[ies] for application of the regulatory takings rule provid[e] some necessary predictability for governmental entities").

Similar concerns have been raised about the balancing test from *Nollan* and *Dolan* applicable to land-use exactions, which the Ninth Circuit extended to personal property. Although the "essential nexus" and "rough proportionality" standards have been viewed by some as "apply[ing] heightened scrutiny to challenged land use regulations," Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 Cal. L. Rev. 609, 622 (2004), by their terms they "are hardly beacons of clarity," Marc R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 Cardozo L. Rev. 93, 107 n.55, 191 (2002); see also Fenster, 92 Cal. L. Rev. at 629, 630 (*Nollan* and *Dolan* are "less clear than * * * rules defining per se regulatory takings as

those that result in * * * permanent physical occupation," and "neither metric is exceptionally clear"). *Nollan* and *Dolan* require courts to grapple with a range of fact-intensive issues, including the "causal relationship between the harm of the proposed new use for the property, the regulation upon which the government relies in requiring the challenged concessions, the cost of the concessions, and the likelihood that the concessions would mitigate the harms." Fenster, 92 Cal. L. Rev. at 629-630; see also Pet. App. 26a-28a (panel decision analyzing purpose and performance of raisin marketing order for means-ends analysis).

In part for these reasons, ad hoc regulatory takings doctrines have engendered sharp criticism. See, *e.g.*, Bruce A. Ackerman, *Private Property and the Constitution* 8 (1977) (describing regulatory takings doctrine as "a chaos of confused argument"); Richard A. Epstein, *The Seven Deadly Sins of Takings Law: The Dissents in* Lucas *v.* South Carolina Coastal Council, 26 Loy. L.A. L. Rev. 955, 966 (1993) (takings test is "so amorphous as to defy description"); J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 Ecology L.Q. 89, 102 (1995) (an "unworkable muddle" that "has generated a plethora of inconsistent and open-ended formulations that have failed to make sense"); John E. Fee, *The Takings Clause as a Comparative Right*, 76 S. Cal. L. Rev. 1003, 1006-1007 (2003) ("[a] jurisprudential mess"); Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. Cal. L. Rev. 561, 562 (1984) ("[C]ourts continue to reach ad hoc determinations rather than principled resolutions."); Charles M. Haar & Michael Allan Wolf, *Euclid Lives:*

The Survival of Progressive Jurisprudence, 115 Harv. L. Rev. 2158, 2170 (2002) ("hopelessly confused"); Joseph L. Sax, *Takings and the Police Power*, 74 Yale L.J. 36, 37 (1964) ("a welter of confusing and apparently incompatible results"); Stephen Durden, *Unprincipled Principles: The Takings Clause Exemplar*, 3 Ala. C.R. & C.L. L. Rev. 25, 27-28 (2013) (describing doctrine as "famously incoherent and a mess, a muddle (or muddled), confused, incomprehensible, standardless, and unprincipled" (internal quotation marks omitted); collecting authorities); John A. Humbach, *A Unifying Theory for the Just-Compensation Cases: Takings, Regulation and Public Use*, 34 Rutgers L. Rev. 243, 244 (1982) ("farrago of fumblings").

2. In contrast to these fact-intensive, ad hoc inquiries, this Court has carved out several bright-line, categorical rules in areas where clarity is particularly important and "in-depth factual inquiry" unnecessary. *Nixon* v. *United States*, 978 F.2d 1269, 1284 (D.C. Cir. 1992). Most obviously, "[w]hen the government physically takes possession of an interest in property for some public purpose," the existence of a taking is typically self-evident and the government is categorically required to pay just compensation. *Tahoe-Sierra*, 535 U.S. at 322 (citing *United States* v. *Pewee Coal Co.*, 341 U.S. 114, 115 (1951)). And this Court has enforced the categorical rules that a taking occurs whenever there is a permanent physical occupation, *Loretto*, 458 U.S. at 426, or a deprivation of all economically beneficial use of private property, *Lucas* v. *S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992); accord Jed Rubenfeld, *Usings*, 102 Yale L.J. 1077, 1101 (1993) ("*Loretto* stands on the idea that particular incidents of property ownership have a

special status that compels compensation for their abridgment.").[3]

Commentators have lauded these per se rules for providing predictability and certainty for property owners—"a ray of light in the otherwise shadowy area of 'takings' law." Steven N. Berger, *Access for CATV Meets the Takings Clause: The Per Se Takings Rule of* Loretto *v.* Teleprompter Manhattan CATV Corp., 25 Ariz. L. Rev. 689, 703 (1983). *Loretto*'s per se rule has the virtue of making "it * * * easy to tell when the rule has been violated—a boundary is traversed." Poirer, 24 Cardozo L. Rev. at 108. As a result, property owners face a less onerous burden in defending and litigating their rights, while governments gain predictability and certainty in the conduct of public affairs, and are subject to the full financial deterrent of the just-compensation guarantee. See *Loretto*, 458 U.S. at 437 ("[W]hether a permanent physical occupation has occurred presents relatively few problems of proof.").

The clarity of these categorical rules also promotes important interests related to private property rights—interests sharply undermined by the Ninth Circuit's approach in this case. A per se rule allows property owners to make investments based on concrete expectations about the risk of government interference. See Patrick Wiseman, *When the End Justifies the Means: Understanding Takings Jurispru-*

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[3] Courts have applied both the *Loretto* and *Lucas* rules to personal property. See, *e.g.*, pp. 18-24, *infra*; *Maritrans Inc.* v. *United States*, 342 F.3d 1344, 1352-1353 (Fed. Cir. 2003) (rejecting government's argument that *Lucas* was inapplicable to takings of "tangible property," such as tank barges).

dence in a Legal System with Integrity, 63 St. John's L. Rev. 433, 457-458 (1988) ("Insofar as property is conceptually a set of expectations, any rule which tends to settle expectations is, in that respect at least, a good rule."); Carol M. Rose, *Crystals and Mud in Property Law*, 40 Stan. L. Rev. 577, 577 (1988) ("hard-edged rules like these * * * are what property is all about"). Put differently, "[t]akings law should be predictable * * * so that private individuals confidently can commit resources to capital projects." Susan Rose-Ackerman, *Against Ad Hocery: A Comment on Michelman*, 88 Colum. L. Rev. 1697, 1700 (1988). Conversely, "ad hoc balancing is impossible to reconcile with a belief in the importance of preserving 'investment-backed expectation[s].'" *Ibid.*

Doctrinal clarity does much to preserve and protect property owners' investment-backed expectations. See Rose-Ackerman, 88 Colum. L. Rev. at 1711. By creating certainty that a physical invasion of property will result in just compensation, the per se rule establishes appropriate ex ante incentives for property owners, who will be secure in the knowledge that *any* physical invasion or occupation of property by the government is a compensable taking, whatever its scope or extent. See *Loretto*, 458 U.S. at 438 n.16 ("[W]hether the installation is a taking does not depend on whether the volume of space it occupies is bigger than a breadbox."). And "property owners and investors who believe that a rule-bound regulatory regime better protects their expectations than does an ad hoc balancing test in theory will commit more resources to capital projects, therefore enabling the highest and best use of property." Fenster, 92 Cal. L. Rev. at 620.

"By offering clear declarations of the extent of property owners' constitutional rights and limiting the discretion of judges and administrative decision makers, clear rules ensure fair and value-neutral coherence, regularity, and predictability across disparate, individual cases." Fenster, 92 Cal. L. Rev. at 619. Conversely, doctrinal uncertainty under the ad hoc regulatory takings framework not only makes investors uncertain "whether or not damages will be paid," but also, if damages are not paid, means that "investors will be left bearing the costs of an uninsurable risk." Rose-Ackerman, 88 Colum. L. Rev. at 1700. From the perspective of optimizing the allocation of valuable resources, "[t]o the extent that investors are risk averse, the very incoherence of the doctrine produces inefficient choices." *Ibid.*

The per se rule also creates salutary incentives for governments, discouraging gamesmanship or efforts to reframe traditional "takings" to exploit doctrinal loopholes or ambiguities. Under a per se rule, it does not matter what type of property is appropriated, whether the property owner retains some kind of limited interest, or what the government's rationale for appropriating private property might be; so long as there is physical appropriation, a compensable taking has occurred. See *Tahoe-Sierra*, 535 U.S. at 323 ("we do not ask whether a physical appropriation advances a substantial government interest" under the "clear rule" governing "categorical taking[s]"). Under the panel's interpretation, by contrast, the government can adopt regulations that physically appropriate property without any categorical obligation to compensate the owner, so long as the regulations satisfy—at most—the "nexus and rough

proportionality" principles of *Nollan* and *Dolan*. Pet. App. 23a.

Uncertainty about how the fact-intensive and ad hoc legal standard will be applied to any given set of facts also reduces the government's anticipated cost of a taking, essentially discounting the rate of compensation by the possibility that the factfinder will conclude the government owes no compensation. That uncertainty not only affects the government's choices, but also changes how property owners interact with the government. "By providing a doctrinal shield against the intrusive overregulation of local governments, formal takings rules smooth the 'frictions' caused by the struggles over regulatory indeterminacy and uncertainty, stabilizing and protecting property rights within the present distribution of property ownership and entitlements." Fenster, 92 Cal. L. Rev. at 620.

In short, the Ninth Circuit's decision undermines important interests critical to the protection of private property rights by replacing the certainty of a categorical rule with the fact-intensive, ad hoc, and fundamentally *indeterminate* balancing test of *Nollan* and *Dolan*.

B. The Panel's Exclusion Of Personal Property From Categorical Protection Affects Private Property Rights In A Broad Range Of Contexts

The practical consequences of the decision below sweep far beyond the Depression-era agricultural regulations at issue in this case to affect property

owners in many other areas.[4] Federal and state case reporters are replete with examples of government attempts to appropriate or occupy personal property, highlighting the important and continuing role of a per se rule in protecting property rights. These cases vividly illustrate how the Ninth Circuit's approach creates incentives for strategic behavior, inviting governments to restructure regulations that effect de facto physical appropriation of personal property in a manner that avoids paying just compensation. These cases undercut any suggestion that the practical need for a categorical, per se rule for personal property is any less acute than in the context of real property.

One colorful example arose in *City of Oakland* v. *Oakland Raiders*, 646 P.2d 835 (Cal. 1982). In 1980, the Oakland Raiders franchise of the National Football League announced its intention to move to Los Angeles. In response, the City of Oakland initiated an eminent domain proceeding to prevent the move by "acquir[ing] by eminent domain the property rights associated with [the Raiders'] ownership of a professional football team as a franchise member of the National Football League."[5] *Id.* at 837. The

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[4] Although the government seeks to limit the decision to the facts of this case (Br. in Opp. 21-22), the explicit language of the court's opinion sweeps far more broadly. See Pet. App. 20a ("we see no reason to extend *Loretto* to govern controversies involving personal property"); accord *id.* at 17a.

[5] For a more detailed history, see Leon F. Mead II, *Raiders: $72 Million, City of Oakland: 0...Was That the Final Gun – A Story of Intrigue, Suspense and Questionable Reasoning*, 9 Loy. L.A. Ent. L. Rev. 401 (1989). Maryland similarly authorized the City of Baltimore to use eminent domain to prevent the NFL's Colts franchise from moving to Indianapolis. See Charles Gray.

California Supreme Court held that the Raiders' property interests were condemnable under California law, bringing into sharp focus the importance of constitutional takings protection.

The California Supreme Court never questioned that assuming possession and ownership of the team would constitute a taking.[6] But under the Ninth Circuit's formulation, it is far from clear whether that premise would hold true, given that the various property rights that make up a football franchise (*e.g.*, trademarks, player contracts) were personal, not real, property. Moreover, in the wake of the ruling here, it is not hard to imagine how Oakland could have altered its strategy to fit the panel's loophole. For instance, the City might have demanded a part interest in the team in the event its owners chose to relocate, perhaps in service of a stated goal of regulating the "market" for professional football services. Or the City might have made the team less valuable by taking possession of a certain percentage of the tickets offered for the government's "account," again in the guise of market regulation. Under the

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Keeping the Home Team at Home, 74 Cal. L. Rev. 1329, 1330-1331 & n.14 (1986).

[6] The California high court held that whether taking the team was a "public use" was a jury question; the Raiders ultimately prevailed on public use, antitrust, and Commerce Clause grounds, effectively rejecting the City's attempt to condemn the franchise. See Mead, *supra* note 5, at 406-407. But there is little reason to believe those alternate protections will be present in a typical case. Cf. *Am. Needle, Inc.* v. *Nat'l Football League*, 130 S. Ct. 2201, 2216 (2010) (noting "special characteristics" of National Football League relevant to antitrust analysis).

panel's approach, a court might conclude that such a regulation was a mere "use" restriction that satisfied the "nexus and rough proportionality" test of *Nollan* and *Dolan*, so long as the Raiders were theoretically entitled to any residual value after the City disposed of (or gave away) the tickets.

In *Milwaukee & Suburban Transport Corp.* v. *Milwaukee County*, 263 N.W.2d 503 (Wis. 1978), Milwaukee County condemned the assets of a private bus system and began operating the system under public ownership. See *id.* at 508 ("There was no interruption of service. The same buses were driven on the same routes by the same employees."). Again, it is far from clear that *Milwaukee*'s view of the transaction as a paradigmatic taking, in which the County expressly appropriated the bus system, would survive the panel's holding that *Loretto* applies only to real property. In any event, the County might have restructured its takeover to fall under the balancing-test framework, potentially exempting itself from any obligation to pay compensation. For example, rather than "taking" the entire bus system, the County could have required the private owners to accept a certain number of riders who present bus fares sold by the County—in the vernacular of the raisin marketing order, setting aside for public use a "reserve" portion of all bus seats, which the County could dispose of as it sees fit, perhaps with the possibility of a contingent future benefit to the bus company. The Ninth Circuit's decision here suggests even those egregious actions would not be subject to a per se physical takings test.

Of course, appropriation of personal property can also occur when a government initially seizes prop-

erty for a purpose other than eminent domain. In *Lee* v. *City of Chicago*, police impounded an innocent bystander's private vehicle for investigation because it had been struck by a stray bullet. 330 F.3d 456 (7th Cir. 2003). After the investigation, the owner discovered that the City had painted large red inventory numbers on three sides of the vehicle. *Id.* at 459. Although the case was not litigated on takings grounds, Judge Wood concluded that the plaintiff had "suffered [a] * * * taking: governmental authorities physically took some of his personal property for a public purpose and kept it for a period of time." *Id.* at 474 (Wood, J., concurring). Notably, she cited *Loretto* in concluding that "[a]ny physical occupation is enough [for a taking], even where the owner retains at least some use." *Id.* at 475. But under the Ninth Circuit's analysis, *Loretto* would not apply, because a car is personal, not real, property, and because any takings claim would be relegated to the "nexus and rough proportionality" standard from *Nollan* and *Dolan*, or the ad hoc balancing test for regulatory takings.

To similar effect, the plaintiff in *Innovair Aviation, Ltd.* v. *United States*, 72 Fed. Cl. 415 (2006), *rev'd on other grounds*, 632 F.3d 1336 (Fed. Cir. 2011), was completing the turboprop conversion of certain airplanes that were under contract to Air Colombia when the U.S. government seized the planes, claiming that Air Colombia was a front for drug cartels that allegedly purchased the airplanes with drug proceeds. 72 Fed. Cl. at 416-418. The plaintiff sought compensation for the taking of the planes. *Id.* at 419. The court held that the seizure was a per se taking of the plaintiff's private property,

analogizing to *Loretto* instead of *Penn Central* because "[h]ere we have the total destruction of the Plaintiff's property." *Id.* at 423. Citing *Nixon*, 978 F.2d 1269 (discussed below and at Pet. Br. 34-35), the *Innovair* court rejected the government's contention that the per se takings analysis only applies to real property, noting that there, as in *Nixon*, "the Plaintiff's personal property was permanently and completely appropriated by the Government." 72 Fed. Cl. at 423. *Innovair* ultimately held that the plaintiff had suffered a compensable taking when the government physically occupied its personal property. The panel's analysis would replace that clear-cut approach with a far more uncertain, ad hoc inquiry.

These cases provide just a few examples of how the panel's holding encourages gamesmanship and strategic behavior, as governments will rationally seek to avoid paying compensation. As *City of Oakland* and *Milwaukee* illustrate, governments often have strong financial, practical, or other incentives to appropriate personal property in a wide range of substantive areas, and to disguise the true costs of those choices. One recent Washington, D.C. law prohibited patented drugs from being sold in the District for an "excessive" price, requiring drug manufacturers to rebut a presumption of excessiveness if the price of a drug is more than 30% higher than in the United Kingdom, Germany, Canada, or Australia. See Prescription Drug Excessive Pricing Act of 2005, codified at D.C. Code §§ 28-4551-28-4555. That statute represented a clear attempt to disguise the true fiscal cost of providing a public benefit—shifting the cost of subsidized drugs from taxpayers (who otherwise would have to use public funds) to a drug's in-

ventors and manufacturers. See *Biotechnology Indus. Org.* v. *District of Columbia*, 496 F.3d 1362, 1374 (Fed. Cir. 2007) ("The Act is a clear attempt to * * * diminis[h] the reward to patentees in order to provide greater benefit to District drug consumers."). Under the Ninth Circuit's reasoning, the District could have achieved the same goal by requiring pharmaceutical companies physically to provide low-income residents with patented drugs free of charge.

If this Court upholds the conclusion that *Loretto*'s per se rule is wholly inapplicable to personal property, public officials nationwide will shift their strategy away from forthright use of eminent domain and toward regulatory regimes that achieve a similar practical outcome on the cheap. The decision here opens a back door to abusive government actions, despite this Court's efforts to bar those approaches though per se rules about physical occupation.

C. The Weight Of Well-Reasoned Authority Rejects A Fact-Intensive Balancing Test For Physical Takings Of Personal Property

Well-reasoned authority from numerous other courts rejects the panel's novel conclusion that *Loretto* is categorically inapplicable to "controversies involving personal property" or where property owners retain some contingent benefit from government expropriation, and the panel's attempt to re-characterize the physical appropriation here as a "use" restriction subject to the balancing test from *Nollan* and *Dolan*. Pet. App. 20a; Pet. Br. 31-36. *Amicus* supplements those arguments and identifies

other authorities that counsel rejection of the panel's novel and sweeping approach.

A leading case is *Nixon* v. *United States*, 978 F.2d 1269 (D.C. Cir. 1992), in which the former President challenged regulations promulgated under the Presidential Records and Materials Preservation Act of 1974 effectively "authoriz[ing] the Administrator of General Services to retain complete possession and control of all papers, documents, memorandums, transcripts, and other objects and materials that constitute the presidential historical records of Richard M. Nixon." *Id.* at 1271 (internal quotation marks omitted). The government advanced precisely the same theory adopted by the panel here—only to have the D.C. Circuit squarely reject that approach. Pet. Br. 34-35. The *Nixon* court's reasoning merits close attention, as it continues to be relevant today. Among other things, the court explained that "[t]he rationale for the per se rule is that actual occupation of property obviates an in-depth factual inquiry to determine whether one's economic interests have been sufficiently damaged as to warrant compensation." *Nixon*, 978 F.2d at 1284. And the D.C. Circuit emphasized that this Court's "actual holding [in] *Loretto* makes no mention of a distinction between real and personal property, nor was any rationale given in the opinion that may justify such a distinction." *Id.*

Underscoring the systematic incentives governments have to push the limits of takings law, the court in *Rose Acre Farms, Inc.* v. *United States*, 373 F.3d 1177, 1196 (Fed. Cir. 2004), felt compelled to emphasize that "[t]he trial court correctly rejected the government's contention that a 'per se' takings analy-

sis is never applicable when personal property is at issue." That case involved a complex set of health and food-safety testing requirements for poultry farmers, which included the seizure and destruction of certain chickens by government agents. The Federal Circuit noted that when this Court had been "presented, recently, with the opportunity" to hold that "categorical takings are limited to the taking of real property," it specifically declined to do so in a case involving other personal property (*i.e.*, interest on lawyers trust accounts). *Id.* at 1196 n.17 (citing *Brown* v. *Legal Found. of Wash.*, 538 U.S. 216 (2003)). The Federal Circuit drew particular significance from this Court's "agree[ment]," in *Brown*, "that a per se approach is more consistent" with prior precedent than an ad hoc standard, and that "the transfer of the interest [on the trust accounts] seems more akin to the occupation of a small amount of rooftop space in *Loretto*." *Brown*, 539 U.S. at 235; see generally *Rose Acre Farms*, 373 F.3d at 1196 n.17.[7]

Other courts and judges have reached the same conclusion. In a case involving a takings challenge to a law requiring tobacco companies to disclose trade secrets, Judge Selya explained that "[l]imiting per se takings analysis to cases involving real property is a crude boundary with no compelling basis in the law." *Philip Morris, Inc.* v. *Reilly*, 312 F.3d 24, 51 (1st Cir. 2002) (Selya, J., concurring in the judgment). And, as noted, Judge Wood looked to *Loretto* in analyzing the

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[7] *Rose Acre Farms* ultimately held that the laws at issue did not involve a per se taking. 373 F.3d at 1197. But the Federal Circuit's extensive discussion of *Brown* makes clear that the case should not be read to support the panel's sweeping approach here.

government's "physical occupation" of a portion of a private automobile. *Lee*, 330 F.3d at 474-475.

R.J. Widen Co. v. *United States*, 357 F.2d 988 (Ct. Cl. 1966) (per curiam), is to similar effect. There, a property owner contended that the United States had taken its personal property by constructing a dam and depriving the property owner of a water supply necessary to operate its leather-tanning business—including not only occupation of real property, but also damage to personal property such as tanning supplies and hides damaged as a result of lack of access to water. *Id.* at 991. Although the court found that the specific damage to personal property there represented consequential damages outside the Fifth Amendment's protection, it emphasized that "[u]ndoubtedly, the United States could here have 'taken' plaintiff's personal property and business, in which case just compensation would be due." *Id.* at 993.

In *Seery* v. *United States*, 161 F. Supp. 395, 399 (Ct. Cl. 1958), an opera star sued the United States "for just compensation for the taking by the Army of her real and personal property." The plaintiff alleged damage to her residence, home furnishings, and other personal property when the U.S. Army commandeered her Austrian "castle-like villa" as an officers' rest home during and after World War II. *Id.* at 396. Without any suggestion of applying a complex regulatory takings analysis, the court undertook a straightforward assessment of what personal property the Army had stolen or destroyed, concluded that "a considerable amount of the plaintiff's personal property

was lost or destroyed while in the Army's possession," and awarded damages accordingly. *Id.* at 399.[8]

This approach is not limited to federal courts. *Department of Agriculture & Consumer Services* v. *Mid-Florida Growers, Inc.*, 521 So. 2d 101, 102 (Fla. 1988), found a compensable taking where Florida had destroyed healthy citrus trees to guard against a citrus canker affecting other groves. Citing *Loretto*, the Florida Supreme Court rejected as irrelevant the state's focus on its own "lack of a possessory or proprietary interest in the destroyed property." *Id.* at 103. The *Mid-Florida* court gave no hint that the straightforward takings claim presented there should be analyzed under an ad hoc, factual inquiry.

By concluding that *Loretto*'s per se physical takings rule does not apply to government appropriation of personal property, and by instead treating a physical taking as a mere "use restriction," the panel drew all of these cases into question, and departed from the great weight of precedent, which applies a categorical standard to claims that the government has physically taken personal property. This Court should endorse the majority view and reverse the contrary holding.

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[8] See also *Starr Int'l Co.* v. *United States*, 106 Fed. Cl. 50, 82 (2012) (holding that *Nollan* and *Dolan* "apply only in cases involving land use exactions," in analyzing claim that federal government bailout of American International Group, Inc., constituted taking of corporate stock).

D. The Marketing Order Cannot Be Defended By Strained Analogy To Direct Market Regulation

In seeking to defend the judgment, the government has argued that the raisin marketing order "is effectively indistinguishable" from a hypothetical alternate scheme in which raisin owners retain ownership of their crop, and are free to "dispos[e] of the raisins in a manner approved by the [Committee] * * * " Br. in Opp. 19-20. In essence, the government invites this Court to analyze the marketing order's reserve-tonnage scheme as if it were a different law—that Congress might have established, but did not—merely "limit[ing] the amount of a crop that a farmer can sell * * *." *Id.* at 20.

To begin with, the argument rests on a false premise. The marketing order does not allow raisin producers and handlers to "dispos[e]" of their own reserve-tonnage raisins, but rather requires transfer of physical possession of those raisins, formally designates them for the Committee's "account," and authorizes *the Committee* to dispose of the raisins as it sees fit—including by giving them away. See note 2, *supra*. The marketing order thus deprives the owner of virtually every stick in the bundle of property rights, transferring those rights to the Committee without compensation. A law that merely caps the amount of raisins that a particular grower may sell leaves the "excess" share in the producer's possession and control, and does not transform a producer's fee interest into a vague "equitable" claim to residual net value. The two regimes are not

equivalent in any relevant constitutional or legal sense.[9]

More generally, the government cites no authority for the startling proposition that an unconstitutional law can be made immune from scrutiny simply because the government, in a legal brief (and without record evidence), says its practical effects are similar to those of a different kind of regulation. For example, this Court has "repeatedly found takings where the government, by confiscating financial obligations, achieved a result that could have been obtained by imposing a tax." *Koontz* v. *St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2601 (2013) (citing, *e.g.*, *Brown* v. *Legal Found. of Wash.*, 538 U.S. 216, 232 (2003)), accord *Loretto*, 458 U.S. at 440 n.19 (similar).

II. The Panel's "Use Restriction" Theory Guts Protections For Personal Property

1. As petitioners explain, the panel ignored the great weight of established precedent when it sought to immunize from constitutional challenge the seizure of a portion of petitioners' raisin crop as a mere "use restriction" (Pet. App. 23a) on personal property,

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[9] In holding that a regulatory prohibition on the sale of eagle feathers was not a taking, *Andrus* v. *Allard* emphasized that the regulations "do not compel the surrender of the [property]," and found it "crucial that [the property owners] retain the rights to possess and transport their property." 444 U.S. 51, 65-66 (1979). Neither factor is present here. In any event, three Justices who joined the majority opinion in *Hodel* v. *Irving*, 481 U.S. 704 (1987), concluded that by "finding a taking" on the facts of that case, *Hodel* had "effectively limit[ed] *Allard* to its facts." *Id.* at 719 (Scalia, J., concurring).

subject only to the balancing test from *Nollan* and *Dolan* previously applied only to land-use permitting exactions. The panel reasoned that the marketing order applies only "insofar as [petitioners] voluntarily choose to send their raisins into the stream of interstate commerce," and suggested petitioners could "avoid" the regulations by "planting different crops, including other types of raisins, not subject to this Marketing Order or selling their grapes without drying them into raisins." *Id.* at 25a-26a.

The notion that the government may condition a business's participation in the market on its willingness to transfer a significant percentage of its goods to the government without compensation is a grave threat to private property rights. That theory admits to no principled limitation, and could justify a range of confiscatory actions, from a requirement that farmers give up 50% of their acreage or other property rights as a condition of selling their crops, to a law that takes physical possession of half the cars from an automaker's assembly line as a "use restriction" on selling them in commerce. The dire implications of the panel's "use restriction" theory for property owners nationwide cannot be overstated.[10]

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[10] The government would doubtless reject the possibility that petitioners could avoid the marketing order by disposing of their raisins in the *intra*state market. See 7 U.S.C. § 608c(1) (defining regulatory authority to reach handling of agricultural products "which directly burdens, obstructs, or affects, interstate * * * commerce"); 7 C.F.R. § 989.15 (defining covered raisin "handler[s]" to include "any person who places, ships, or continues natural condition raisins in the current of commerce from within the area to any point outside thereof"). Compare also *Wallace* v. *Hudson-Duncan & Co.*, 98 F.2d 985, 989 (9th Cir. 1938) (rejecting takings challenge to walnut marketing

2. In addition to its sweeping practical implications, the panel's "use restriction" theory lacks any sound basis in precedent. Most notably, it contravenes *Loretto*'s explicit instruction that "a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation." 458 U.S. at 439 n.17. Indeed, the panel's holding is difficult to distinguish from obviously prohibited practices the Court recognized such a rule would permit, such as "allow[ing] the government to require a landlord to devote a substantial portion of his building to vending and washing machines, with all profits to be retained by the owners of these services and with no compensation for the deprivation of space." *Ibid.* So too here. Accepting the Ninth Circuit's "use restriction" theory would essentially condition petitioners' right to dispose of their personal property on their "agreement" to forfeit compensation for a physical appropriation of a portion of that property. Condoning that theory would open the door to countless other abusive government tactics that seek to exploit private property for public use, without compensation. But as this Court has recognized, "[t]he right[s] of a property owner * * * cannot be so easily manipulated." *Ibid.*

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order on ground that grower could "choos[e] not to comply with the interstate requirements of the Order, [and] nevertheless retain all its walnuts intrastate and dispose of them to intrastate buyers"), with *Gonzales* v. *Raich*, 545 U.S. 1, 17 (2005) ("Our case law firmly establishes Congress's power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce.").

Courts have long enforced the requirement to pay just compensation without any hint that this core constitutional obligation could be sidestepped through government semantics. In *Omnia Commercial Co.* v. *United States*, 261 U.S. 502, 511 (1923), this Court confirmed that a steel company would be entitled "to the just compensation guaranteed by the Constitution" where the government had requisitioned all its steel output. The Court gave no suggestion that such a takings claim would be defeated by the possibility that the steel company could choose to produce a different product.

Similarly, *Liggett & Myers Tobacco Co.* v. *United States*, 274 U.S. 215, 220 (1927), sustained a takings claim, and the obligation to pay full compensation, where the government requisitioned the personal property of "tobacco products" from a manufacturer. The government could not avoid compensation simply by re-characterizing the "compulsory" requisition order as a mere contractual "offer to purchase." *Ibid.* And *United States* v. *New River Collieries Co.*, 262 U.S. 341 (1923), upheld a takings claim where the government "requisitioned * * * upwards of 60,000 tons of bituminous coal," *id.* at 342. This Court never suggested that the Takings analysis would involve anything other than straightforward, market-value compensation for the personal property that had been seized.

The same principle is reflected in lower-court decisions today. *A&D Auto Sales, Inc.* v. *United States*, 748 F.3d 1142 (Fed. Cir. 2014), sustained the viability of takings claims based on the federal government's alleged coercion of General Motors and Chrysler to cancel franchise agreements with certain

local dealerships, in exchange for federal financial assistance. In affirming the district court's denial of the government's motion to dismiss, the court gave no suggestion that the government could avoid takings liability simply by inviting the plaintiff auto dealers to "avoid" harm by selling other brands of automobiles. *Cf.* Pet. App. 25a-26a.

Turney v. *United States*, 115 F. Supp. 457 (Ct. Cl. 1953), held that a takings claim was actionable where the Philippines had forbid exportation from that country of certain U.S. military surplus equipment, which the United States had previously sold the plaintiffs at auction. The Court of Claims gave no suggestion that the plaintiffs' takings claim would be defeated by the possibility that they might elect to sell something other than military equipment, or sell their surplus property within the Philippines. *Id.* at 463-464.

3. Shielding the marketing order from constitutional scrutiny by re-characterizing it as a "use restriction" violates the fundamental principle that the Takings Clause "bar[s] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960); accord Carlos A. Ball & Laurie Reynolds, *Exactions and Burden Distribution in Takings Law*, 47 Wm. & Mary L. Rev. 1513, 1534 & n.104 (2006) (*Armstrong* formulation "endorsed in almost every important takings opinion of the last thirty years"). The order challenged here does not merely regulate the domestic raisin market, but allows the government to use raisins to further various national policies, such as directing raisins to be used by sale or

gift to U.S. agencies, school lunch programs, foreign governments, charitable organizations—or even raisin farmers themselves, for export. See 7 C.F.R. §§ 989.67(b)(2)-(4). The panel opinion effectively freed the government to pursue those initiatives on the cheap—without the need to use tax dollars to pay for the raisins distributed.

Taking physical possession of petitioners' raisins as a condition of their participation in the domestic market places the entire burden of implementing those government policies on raisin producers and handlers, rather than the public. The rule is easily generalizable—by the same logic, the government might require airlines to "reserve" a certain percentage of seats to be provided to government employees for free or a substantial discount, thus shifting the cost for government travel from the public to the airlines. Condoning the panel's "use restriction" theory would permit government entities to shift the burden of a broad variety of government programs from the public to private property owner. That fundamentally conflicts with the Takings Clause's core constitutional guarantee.

CONCLUSION

The judgment should be reversed.

Respectfully submitted.

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